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Supreme Court of the United States

OCTOBER TERM, 1936

No. 625

FRED L. FOX, INDIVIDUALLY AND AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

vs.

THE DRAVO CONTRACTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

REPLY BRIEF OF APPELLANT

FOREWORD

Much of the argument advanced in appellee's brief was anticipated and met by appellant's original brief. There are, however, a number of assertions made in appellee's brief which it is believed justify the filing of this reply brief in answer thereto or in explanation thereof. This will be done rather categorically by referring to the pages of appellee's brief on which the subject matter is found.

ARGUMENT

Appellee's Statement of the Case

On pages 4 and 5 of appellee's brief, statement is made that appellant inaccurately stated the position of appellee with reference to its being an agent or instrumentality of the United States. Appellant's contention as to this would seem to be borne out by the following statement in the Bill of Complaint:

> "* * * Plaintiff avers that the contracts aforesaid were the method and plaintiff was the *means and instrumentality* used by the United States of America in the construction of said locks and dams." (R. 10.) . (Italics ours.)

Be that as it may, the brief of appellee, on pages 11 and 12 thereof, specifically states that the position of appellee now is that it is an *independent contractor.*

On page 5 of appellee's brief, it is stated that the contracts were "for the furnishing of all labor, materials and work for the respective locks and dams". It was certainly contemplated that the contract was for the erection of the locks and dams *complete and ready for operation.* (R. 63, 98 and 391.)

On page 6 of appellees brief, it would seem to be contended that the consideration to be paid was not a lump sum. While it is true that certain unit prices for the several items were set forth, it is submitted that the total thereof was the consideration to be paid. (R. 62 and 391.)

It is stated on page 6 of appellee's brief that

> "* * * Appellee's estimated costs and bids on the four contracts did not include any items to cover the gross income tax * * *."

This should be corrected to read, "Appellee's estimated costs for bids on the four contracts did not include any *specified item* to cover the gross income tax." (R. 375.)

It should be further noted that appellee at the time of entering into the contracts, knew of the gross sales and income tax law of West Virginia. (R. 375.)

On pages 6 and 7 of appellee's brief, it is stated:

> "Appellee purchased all of the materials for the roller gates, lock gates, cranes, racks, spur rims, structural steel, patterns, hoisting mechanism and equipment outside West Virginia and, as specified in the bids and contracts, fabricated them at its shops at Neville Island, Pennsylvania."

With reference to this, it is submitted that at no place in the bids and contracts is it specified that such would be fabricated by appellee at its shops at Neville Island, Pennsylvania, with the exception of the "roller gates". This provision is contained in the bid. (R. 397.)

On page 7 of appellee's brief, it is stated that some material was purchased in West Virginia and installed in the dams. We respectfully refer to the record, pages 366, 367, 368 and 369 to show the vast amount of materials, etc. purchased in West Virginia.

Appellee's Contention that the Tax Involved Is a Direct Burden Upon the Exercise of a Governmental Function, and, Therefore, Unconstitutional.

It is noted that on pages 11 and 12 of appellee's brief, it is again stated that appellee's position is that it is an *independent contractor* and *not an instrumentality of the Government.*

On page 12 of its brief, appellee asserts that the contracts were the means or instrumentality by which the United States performed a governmental function, and that said contracts are hence exempt from an alleged direct burden imposed by the tax. Appellant has never taken the position that it could tax the contracts or the means or instrumentalities of the Government. The tax sought to be imposed is not upon the contracts, but upon the contractor who admittedly is an *independent contractor* for gain. It is not laid upon the choice of means, the making of the contracts, the contracts themselves or any transaction to which the Federal Government was a party or in which it was immediately or directly concerned.

It is again stated on page 13 of appellee's brief that no item was included to cover the West Virginia gross sales and income tax. We again respectfully submit that this should read "no specified item". (R. 375.)

On page 14 of appellee's brief, it is stated that business in the year 1932 being slack, that appellee desired to provide work for its employees. We can find nothing in the record on which this statement can be based. On the same page, statement is made that if the assessment involved is upheld, that appellee and any future bidders on Government contracts will necessarily be obliged to add the amount of the tax to their bids. This is purely argumentative and conjectural on the part of the appellee.

Appellee's Argument as to the Nature of the Tax

Appellee, on pages 14, 15, 16, 17, 18, 19, 20 and 21 of its brief, attempts to point out that the tax sought to be imposed in this case is different from that imposed in the cases cited by appellant in his brief. While this may be generally true from the standpoint of appellee,

with the exception of *Alward* v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496; *Silas Mason Co., Inc.* v. *State Tax Commissioner*, 61 P. (2d) 1269; and *Ryan* v. *State*, 61 P. (2d) 1276, cited in appellant's brief, (p. 19 and 48) it is respectfully submitted, and urged most strongly, that the principles enunciated in those cases are applicable to the case at bar, although in each specific case the particular tax involved was not of the exact nature of the tax involved in this case, with reference to the subject matter thereof. In dealing with this, appellee points out the subject matter of the tax imposed in the cases cited in appellant's brief, in all of which the same was upheld and declared valid. It is interesting to note that the tax in said cases was one upon either an independent contractor with the Government or a person not an agent or instrumentality of the Government. It is further interesting to note that the cases cited by appellee to support the proposition that the tax in this case is a burden upon the Federal Government are all cases which involve a tax upon an agent or instrumentality of the Government or upon a transaction had directly with the Government. To mention a few of such and the nature of the tax involved will illustrate the meaning of this statement. They are:

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857; (This was a direct sale to the Government and a tax thereon—tax invalid.)

Choctaw, Oklahoma & Gulf Railroad Co. v. *Harrison*, 235 U. S. 292, 59 L. Ed. 234; (This was a tax on a Federal agency or instrumentality—tax invalid.)

McCulloch v. *Maryland*, 4 Wheat. 316; (This was a tax upon a governmental means or agency—tax invalid.)

Dobbins v. *Commissioners of Erie County,* 16 Pet. 435, 10 L. Ed. 1022; (Tax on an instrumentality of the Government—tax invalid.)

Ohio v. *Thomas,* 173 U. S. 276, 43 L. Ed. 699; (Tax on governor of soldier's home—tax invalid.)

Indian Oil Co. v. *Oklahoma,* 240 U. S. 522, 60 L. Ed. 779; (Tax upon a Federal agency—tax invalid.)

Johnson v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126; (Regulation of a Federal employee—an instrument of the United States—invalid.)

Clallam County v. *U. S.,* 263 U. S. 341, 68 L. Ed. 328; (Tax on a Federal agency—tax invalid.)

Northwestern Mutual Life Insurance Co. v. *Wisconsin,* 275 U. S. 136, 72 L. Ed. 202; (Tax on interest of U. S. bonds—tax invalid.)

Gillespie v. *Oklahoma,* 257 U. S. 501, 66 L. Ed. 338; (Tax on a Federal instrumentality—tax invalid.)

Jaybird Mining Co. v. *Weir,* 271 U. S. 609; 70 L. Ed. 1112; (Tax on Federal agency or instrumentality—tax invalid.)

Telegraph Co. v. *Texas,* 105 U. S. 460, 26 L. Ed. 1067; (Tax on a Government agent—an instrument of foreign and interstate commerce —tax invalid.)

For the sake of comparison the cases cited by appellant in its brief upholding a tax can be noted as follows:

Trinityfarm Construction Co. v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 918; (Tax upheld—independent contractor.)

Casement & Co. v. *Brown,* 148 U. S. 615, 37 L. Ed. 582; (Tax upheld — independent contractor.)

Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384; (Tax upheld—not a Government instrumentality.)

General Construction Co. v. *Fisher,* (Ore. 1934) 39 P., (2d) 358; (Tax upheld—independent contractor.)

Ralph Sollitt & Sons Construction Co. v. *Virginia,* 172 S. E. 290; (Tax upheld—independent contractor.)

Kreipke v. *Commissioner,* 32 Fed. (2d) 594; (Tax upheld—not an instrumentality of the Government.)

Silas Mason Company, Inc. v. *Henneford,* 15 Fed. Sup. 958; (Tax upheld — independent contractor.)

Silas Mason Co., Inc. v. *State Tax Commissioner,* 61 P. (2d) 1269; (Based on gross income—tax upheld—independent contractor.)

Hence, it would seem to be a fair deduction from the above cases, to state, that no matter what the nature of the tax might be with reference to whether or not it imposes a burden upon the Federal Government, its effect is determined to a great extent by the status or nature of the person or transaction sought to be taxed, whether he be an independent contractor with the Gov-

ernment, an agent or instrumentality of the Government, or a transaction had directly with the Government. The contention of appellee seems to be, however, that irrespective of the nature of the business, person or transaction sought to be taxed, that if said tax is one, the amount of which is based upon gross receipts, the same is invalid. Appellee devotes pages 19, 20 and 21 of its brief to this argument, and cites the cases of *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 62 L. Ed. 1135, and *Crew Levick Co.* v. *Pennsylvania;* 245 U. S. 292, 62 L. Ed. 295, as sustaining its position. Although we believe the position of appellant with reference to this argument is fully set forth on pages 53, 54 and 55 of appellant's brief, we wish to make the further observation, that the tax involved in the *U. S. Glue Co.* and in the *Crew Levick* cases, above referred to, was upon businesses of which a necessary and substantial part thereof was carried on in interstate commerce. In other words, the person sought to be taxed was doing a business in interstate commerce; its transactions were in interstate commerce; and the success of its business depended upon interstate commerce. Interstate commerce was a substantial part and parcel thereof. The tax imposed was upon the very carrying on of the business of interestate commerce. Hence, in those cases, it is not difficult to see where a tax based upon the gross income of the business would of necessity seriously affect the interstate commerce part thereof. However, the tax in the instant case does not assume those proportions. The tax is upon the business of *contracting* in the State of West Virginia. Can it reasonably be said in any sense of the word that such business embraces *as a necessary part* thereof, any transaction with the Federal Government, whereby the imposition of such a tax would constitute a burden upon said Government. The court,

in speaking of the tax in the case of *Crew Levick Co.* v. *Pennsylvania,* supra, at page 297 thereof, said:

> "* * * It bears no semblance of a property tax, or a franchise tax in the proper sense; *nor is it an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise.* * * *" (Italics ours.)

As heretofore stated, the tax in this case is not upon the choice of means, the making of the contracts, the contracts themselves or any transaction to which the Federal Government was a party or in which it was immediately or directly concerned. While in the cases cited by appellee as sustaining the proposition that the tax cannot be based upon gross receipts, specifically show that the tax therein was imposed directly on the carrying on of the interstate business. The distinction between those cases and the case at bar thereby becomes apparent.

Appellee's Statement that the West Virginia Gross Sales and Income Tax Being a Direct Burden on the Performance of a Governmental Function is Unconstitutional.

Appellee, to sustain its contention relative to this proposition, cites *McCulloch* v. *Maryland,* 4 Wheat 316, 4 L. Ed. 579; *Osborn* v. *Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204; *Union Pacific Railroad Co.* v. *Peniston,* 18 Wall 5, 21 L. Ed. 787; *Weston* v. *Charleston,* 2 Pet. 449, 7 L. Ed. 481; *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 72 L. Ed. 857. It will be noted that the tax in these cases was one imposed upon a governmental agency or upon a transaction direct with the Government. On

page 27 of appellee's brief, after quoting from the *Panhandle* case, the following statement appears:

> "It is submitted that there is no distinction between a tax of specified cents per gallon on gasoline sold to the United States and a tax of a per cent of the gross receipts for materials and machinery delivered to, and work done for, the United States, in so far as the direct burden of those taxes on the respective transactions is concerned. If one of those taxes is unconstitutional, the other is also."

Appellee evidently loses sight of the fact that in the *Panhandle Oil Company* case, the sale was made direct to the Government, and the tax levied thereon. While in the instant case, the tax is upon an *independent contractor*, and is not levied upon the contract.

After quoting from the case of *Trinityfarm* v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918, appellee, on page 29 of its brief, states as follows:

> "In the case at bar, the tax *is* 'laid upon the choice of means, * * * the contracts themselves', and upon a 'transaction to which the federal government is a party, or in which it is immediately or directly concerned.' Furthermore, the exaction is 'laid upon the amounts, gross or net, received by the contractor.' "

The fault of this argument is that appellee misconceives the nature of the tax in question, attempting to construe it as a tax upon the contracts, the choice of means and a transaction with the Federal Government, when, in truth and in fact, such is not the nature of the tax in any sense of the word.

On page 31 of appellee's brief, in an effort evidently to minimize the strength of the holding in the case of *Silas Mason Co., Inc.* v. *Tax Commissioner,* 61 P. (2d) 1269, the statement is made that,

> "* * * No consideration was apparently given to the fact that the tax might have been a burden on a governmental function and invalid for that reason, although not invalid on account of any inherent governmental attribute of the contractors."

The fact that the Court did not discuss this question in the opinion does not of itself mean that the matter was not considered. It might just as well be argued that the Court did not consider the contention urged here by the appellee of sufficient importance to embody the same in its opinion. It is respectfully submitted that the opinion of the Court in that case is one which apparently considers the tax there involved fully and from all angles.

On page 32 of appellee's brief, this statement is made:

> "We are not here concerned with the nature of the contractor, but with the effect of the tax. This distinction is drawn in the case of *Union Pacific Railroad* v. *Peniston,* 18 Wall 536, as follows: * * *"

It is well to note that in that particular case, the tax was upon a Federal agency, and the opinion of the Court pointed out that the exemption of *Federal agencies,* from State taxation was dependent not upon the nature or upon the mode of their constitution, or upon the fact that they were agents, but upon the effect of the tax. Truly, a tax upon the operations of a Federal agency

is a direct obstruction to the exercise of Federal powers. However, the appellee is not a Federal agent or agency, and not being such, it is respectfully submitted that it is of utmost importance in determining whether or not the tax imposed in this case is valid or invalid to see and determine the exact nature of appellee with respect to its relation to the Federal Government. Namely, was it an independent contractor; was it a Federal agency, or was the tax upon a direct transaction with the Federal Government? On the same page, appellee states that these contracts are exempt from a State gross income tax. Appellant has never questioned that assertion. May we again reiterate that the tax is upon the *business of contracting* in West Virginia.

Appellant's Statement that It Has the Right to Restrain the Collection of the Tax on the Ground that it Is Unconstitutional.

On page 33 of appellee's brief, it is stated that in order to sustain the contention of the appellant that "appellee has no right to complain of the tax imposed in this case, the Federal Government not complaining nor having commissioned appellee to intervene in its behalf", that it will be necessary to overrule a long line of decisions in which this Court has held certain taxes imposed by States to be unconstitutional, on the ground that they impeded the exercise of Federal powers, at the suit of the private party against whom the tax was assessed. Appellant cites several cases on page 34 of its brief in support of this. It is submitted that an examination of these cases will reveal that in each one thereof the tax involved was a tax upon a Federal agency or instrumentality or upon a transaction had direct with the Federal Government. Citation of these cases will better illustrate this point. They are as follows:

Dobbins v. *Erie Co.*, 16 Pet. 435, 10 L. Ed. 1022; (Tax upon an instrument, emolument and person used by the United States.)

Choctaw, Oklahoma & Gulf Railroad Co. v. *Harrison*, 235 U. S. 292, 59 L. Ed. 234; (Tax on Federal agent or instrumentality.)

New York ex rel. Rogers v. *Graves*, 57 Supreme Court (Adv.), 269; (Tax upon an employee of a Federal instrumentality.)

Weston v. *City Council of Charleston*, 2 Pet. 449; (State tax of Federal securities.)

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218; (Tax on direct transaction with Federal Government.)

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759; (Federal tax on income from municipal bonds.)

Collector v. *Day*, 11 Wall. 113, 20 L. Ed. 122; (Federal tax on salary of State officer.)

Indian Motocycle Co. v. *U. S.*, 283 U. S. 570, 75 L. Ed. 1277; (Tax on direct sale to State agency.)

McCulloch v. *Maryland*, 4 Wheat. 316; (Tax on governmental means.)

In those cases, the relationship which the parties bore to the Federal or State Government was such that they in effect constituted a part thereof, and a tax upon them was in effect a tax upon the Government, Federal or State, as the case might be. In the instant case, the appellee being an independent contractor and the tax being assessed against the privilege of contracting in the

State of West Virginia, and not upon the contract itself, or upon any direct transaction with the Federal Government, a much different situation prevails.

It is interesting to note that the cases sustaining appellant's position that appellee has no right to complain in this case, are cases in which the complaining party was an *independent contractor* with the Government. These cases are discussed at pages 56, 57 and 58 of appellant's brief.

Appellee's Propositions II and III.

These propositions are stated on page 38 of appellee's brief and are considered together. While not admitting the applicability of any of the cases cited by appellee in its brief, which are claimed to support these propositions, nor admitting the soundness of any arguments advanced therein relative thereto, is is respectfully submitted that the authorities cited and argument made on the part of appellant relative thereto, being point I of appellant's argument, at page 20 of its brief, fully meet and prevail over those advanced by appellee relative thereto.

Point IV of Appellee's Argument.

The proposition here advanced is contained on page 62 of appellee's brief. While appellant does not admit the applicability of any of the cases cited thereunder, to the facts of the present case nor the soundness of any argument on the part of appellee relative thereto, it is respectfully submitted that the cases cited and arguments advanced on the part of appellant in its brief under heading III at page 33 thereof, fully meet and prevail over those advanced by appellee in its brief.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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